80-1185

No.

Supreme Court, U.S.
FILED
JAN 14 1981
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EMORY M. WILSON,
Petitioner,

versus

STATE OF MISSISSIPPI,
Respondent.

On Writ of Certiorari to
The Supreme Court of Mississippi

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Was the Petitioner denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments to the Constitution by the trial court's refusal to admit into evidence before the jury threats and other forms of duress which precipitated and forced the Petitioner's involvement in a crime?

2. Was the Petitioner denied his Sixth Amendment right to effective counsel by his former counsel's inability and failure to recognize that communicated threats to the Petitioner were admissible evidence?

3. Was the Petitioner denied due process of law as required by the Fifth and Fourteenth Amendments to the Constitution by the trial court's refusal on its own motion to admit into evidence the deposition of a key defense witness when admission of such deposition had previously been agreed upon by the Petitioner's former counsel and the prosecution?

4. Was the Petitioner denied due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution on the appeal level by the Mississippi Supreme Court's error in its construction and interpretation of the record of testimony as adduced in the trial court?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 7

POINT I 7

POINT II 18

POINT III 22

POINT IV 25

CONCLUSION 28

CERTIFICATE 30

APPENDIX A 1a

APPENDIX B 16a

APPENDIX C 17a

APPENDIX D 32a

PREVIOUS PAGE WAS BLANK

TABLE OF CITATIONS

Page

U.S. CONST. AMEND. V 2,18

U.S. CONST. AMEND. VI i,2,17,18

U.S. CONST. AMEND XIV,
SECT. I i,3,9,17,18,27

CASES:

Bateman v. State, 64 Miss. 233, 1 So. 172
(1887) 11

Beasley v. United States, 491 E.2d 687
(6th Cir. 1974) 22

Chambers v. Mississippi, 410 U.S. 284, 35
L.Ed.2d 297, 93 S.Ct. 1038 (1973) 26,27

Chapman v. California, 386 U.S. 18, 87 S.Ct.
824, 17 L.Ed.2d 705, 24 ALR 3d 1065 at 1072
(1967) 15,16

Clark v. State, 123 Miss. 147, 85 So. 188
(1920) 10

Evans v. State, 315 So.2d 1 (Miss. 1975) 21

Harold Fahy, Petitioner v. Connecticut, 375
U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963) .. 14,15

Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974) .. 22

Kotteakos v. United States, 328 U.S. 750, 66
S.Ct. 1239, 90 L.Ed. 1557 (1946) 16

TABLE OF CITATIONS (Continued)

Page

Leverett v. State, 112 Miss. 394, 73 So. 273 (1916) 11

McKenzie v. State, 233 Miss. 216, 101 So.2d 651 (1958) 18

Miller v. United States, 120 F.2d 968 (10th Cir. 1941) 12

People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487 (1963) 34 Cal. R. 863 22

People of the State of New York, Respt. v. Michael Alex, Appt., 260 N.Y. 425, 183 N.E. 906 (1933) 13

Poe v. United States, 233 F.Supp. 173 (D.D.C. 1964) 352 F.2d 639 22

Powe v. State, 169 So. 763 (Miss. 1936) 11

Powell v. Alabama, 287 U.S. 45 (1932), 53 S.Ct. 55, 77 L.Ed. 158 18

Stewart v. State, 229 So.2d 53 (Miss. 1969) 22

U.S. v. Cline, 570 F.2d 731 (8th Cir. 1978) 12

U.S. v. De Coster, 487 F.2d 1197 (D.C. 1973) 22

U.S. v. Hearst, 563 F.2d 1331 (9th Cir. 1977) 17,18

OTHER AUTHORITIES:

Federal Rules of Evidence 801(c) 9

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OPINIONS BELOW

The Opinion of the Mississippi Supreme Court is printed herein as Appendix A. The Order denying the Petition For Rehearing is printed as Appendix B. The Revised Opinion of the Mississippi Supreme Court is presented as Appendix C. The Dissent entered on the Rehearing is printed as Appendix D.

JURISDICTION

The Judgment of the Mississippi Supreme Court was entered on June 4, 1980. The Court denied a Petition

for Rehearing on December 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(c) since a right has been especially set up and claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VI

"In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

AMENDMENT XIV, SECTION 1

". . . . . nor shall any state deprive any person of life, liberty, or property without due process of law . . . ."

STATEMENT OF THE CASE

The Petitioner, Emory M. Wilson, presently incarcerated by the Mississippi Department of Corrections, was a resident of Fort Valley, Georgia, attended the public schools of Peach County, Georgia, and is a graduate of Mercer University. The Petitioner has received a Commission in the R.O.T.C. after graduation from Mercer University in 1953, and at the time of his trial here had served over 29 years in the Army Reserve and had attained the rank of Full Colonel.

Colonel Wilson had been happily married for 26 years at the time of the trial, and has one daughter and two sons. He has been in the furniture business since 1958 and owns stores in Fort Valley and Macon, Georgia. Colonel Wilson had previously served as Assistant Commandant of the Army Reserve School at Camp Shelby in the years 1971, 1972, 1973 and 1974, and as Commandant of the school in the year 1977.

He has been active in all community organizations and an active member of the First Baptist Church in Fort Valley. Several fellow citizens from Fort Valley testified that the Petitioner was an outstanding citizen who had contributed much to his community and was a man of great character.

Colonel Wilson's duties with the Army Reserve required him to make frequent trips to Atlanta, Georgia, and to be on military duty and assignment in the Atlanta area. It was during one of these trips that he became inadvertently involved with dangerous individuals who apparently were part of the so-called Dixie Mafia. In July, 1977, at the Holiday Inn in Atlanta, Georgia, the Petitioner was introduced to an individual who identified himself as Blake Brown. In need of finances for his business, the Petitioner borrowed a sum of $3,000.00 at 18 percent interest from Brown in August, 1977.

In July, 1978, the Petitioner began receiving threatening telephone calls from Brown. Brown threatened to burn down the Petitioner's business and also threatened death and bodily harm to the Petitioner and the Petitioner's family. Brown further threatened the Petitioner with revelation to the Petitioner's wife and family of an affair between the Petitioner and a woman identified as Linda if the Petitioner did not meet Brown immediately in Hattiesburg, Mississippi.

As a result of these threatening calls and in fear of harm to himself or his family and revelation of his past, the Petitioner reluctantly agreed to meet Brown in Hattiesburg, Mississippi. Upon arrival in Hattiesburg, Mississippi, the Petitioner met with Brown at which time he was seized, beaten, and threatened at gunpoint by Brown and an unknown white male who identified himself as John. At gunpoint and in fear of death at the hands of Blake Brown, the Petitioner was forced

to drive his captors to the Elam Arms Dormitory at the University of Southern Mississippi, Hattiesburg, Mississippi, where three officers of the United States Army Reserve were about to pay large sums of money to United States Army Reserve students there in attendance. The Petitioner's only participation in the robbery was as driver of the vehicle during which time he was constantly threatened with death if he attempted to escape or impede the acts of his captors. After the commission of the robbery, his captors forced him to drive to a wooded area where the Petitioner believed he was to be killed. His captors, however, were panicked by a passing police car and instructed the Petitioner, again on threat of death to himself and to his family, to meet them with the money at the Alamo Plaza Motel in Atlanta, Georgia. The Petitioner was instructed to register under a fictitious name and await the arrival of Brown.

Horrified and confused by the events which had transpired, the Petitioner returned to Atlanta. The Petitioner, however, returned the stolen money to military authorities and attempted to gain assistance in the capture of Brown and John. He was instead arrested and charged with armed robbery.

The Petitioner waived extradition and was returned to Hattiesburg, Mississippi, where he was tried and convicted of armed robbery in the Circuit Court of Forrest County. The Petitioner was sentenced to serve a term of twenty (20) years in the Mississippi Department of Corrections without parole. The record re-

veals no effort by the State of Mississippi to apprehend the other two men and in fact they have never been apprehended although Colonel Wilson conducted a long and urgent search for them alone and unaided.

At the trial court level, the Petitioner willingly admitted his presence at the scene of the crime. The Petitioner attempted to interpose the defense of duress at the trial court level in that he was forced, through communicated threats of violence to both himself and his family and later forced at gunpoint, to participate in a crime which the Petitioner had no predisposition or intent to commit. During the trial the Petitioner tried in vain to give testimony of the threats made to him by the actual perpetrators of the crime. This testimony was excluded by the trial court as hearsay. The trial court even denied the Petitioner the right to deny his participation in the crime as follows:

> "BY MR. CONNER: Colonel, I'm going to ask you a question. Did you voluntarily participate in that robbery?
>
> BY MR. WEATHERS: Objection, Your Honor. That's improper. That's for this jury to determine.
>
> BY THE COURT: Sustained.
>
> BY MR. CONNER: Did you plan that robbery?
>
> BY MR. WILSON: No sir.

BY MR. WEATHERS: Objection, Your Honor. Same reason.

BY THE COURT: Sustained. Jury you will disregard the response to that question and the record will be stricken of that response."

No more fundamental right can be asserted by a Defendant, or guaranteed him by the Constitution of the State of Mississippi and of the United States, than the right to take the stand and deny, under oath, his guilt and participation in the crime with which he is charged. This elementary right was denied in this case.

An appeal was taken to the Mississippi Supreme Court and the case was affirmed, the Opinion of the Mississippi Supreme Court appearing herein as Appendix A. A Petition for Rehearing was filed and was denied. The Order denying the Petition appears as Appendix B. In denying the Petition the Mississippi Supreme Court filed a Revised Opinion which appears as Appendix C. A Dissent was filed on the Rehearing and appears herein as Appendix D.

ARGUMENT

I.

The Mississippi Supreme Court In Its Opinion Correctly Held That The Trial Court Was In Error In Excluding As Hearsay Evidence The Testimony Of The Petitioner Herein As To The Statements And Threats Made To His Person By The Participants Which Were Material To The De-

fense Of Duress Asserted By Him, But The Mississippi Supreme Court Incorrectly Held That Such Error On The Part Of The Trial Court Was Not Reversible Error And The Exclusion Of Such Statements Effectively Denied The Petitioner Due Process Of Law.

The concise question which confronted the Mississippi Supreme Court and which is urged most respectfully upon this Court in this Petition involves the excluded testimony of the Petitioner about the threats, statements, and actions of Blake Brown and a man known only as John, who, according to the Petitioner, were the perpetrators of the armed robbery and forced him to be an unwilling participant therein for which he alone has been arrested and convicted. The record will show that from the first objection made and sustained until the last, the trial court ruled as hearsay testimony any statements made by the actors during the time of the robbery and immediately prior thereto and after which the Petitioner contended were the cause for his involuntary participation in the robbery.

Suffice it to say, the objections of the State of Mississippi were so vehemently made and promptly sustained by the Court until even the prior counsel of record for the Petitioner apparently became convinced that said statements were hearsay as evidenced by the following colloquy appearing in the record:

"BY MR. CONNER: What did you do when that shotgun was on you?

BY MR. WILSON: I obeyed him, sir. I was instructed to follow the blue-black van. At first I said I wouldn't go, and I asked him what was going on. And he told me . . .

BY MR. WEATHERS: Object to what he told him. That's hearsay.

BY THE COURT: Sustained.

BY MR. CONNER: Colonel, I realize you are not acquainted with rules of evidence. I just want you to tell this Court and jury what you did . . ."

The Mississippi Supreme Court, in its opinion, noted "Upon the testimony, exclusion of the actual statements made by Blake Brown was error but does not require reversal." Their finding ends there.

The Fourteenth Amendment to the Constitution of the United States guarantees that no person shall be deprived of life, liberty, or property without due process of law. Inherent in the concept of due process is the right to a Defendant in a criminal trial to defend himself within established rules of evidence and procedure. In the present case, the Petitioner was denied the opportunity to adequately defend himself when the trial judge erroneously excluded statements made to the accused that coerced him into participation in an armed robbery. The exact words of one Blake Brown who threatened the Petitioner's life were excluded as hearsay. Federal Rules of Evidence 801(c) defines hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in

evidence to prove the truth of the matter asserted." Clearly, that was not the purpose of which the Petitioner sought to introduce threats to him. They were offered to show the state of mind of the Petitioner and to contribute to his defense that he acted under duress. The validity of such testimony has long been recognized by the Mississippi Supreme Court. In *Clark v. State*, 123 Miss. 147, 85 So. 188 (1920) the Mississippi Supreme Court held that testimony concerning the state of mind of the accused and of the deceased was admissible.

> "The evidence as to who was the aggressor in the fatal encounter, or the solution of which the guilt or innocence of the Appellant depends, being in irreconcilable conflict, the state of mind of each of the participants therein toward the other was a material inquiry, and any evidence pertaining thereto was relevant and, unless incompetent on some other ground, should have been admitted." *Clark v. State*, 123 Miss. 147, 85 So. 188 at 190.

The plea of duress is an affirmative defense which by its very nature places a heavy burden on the Defendant asserting it to account for his actions. Nevertheless, having once asserted it, the burden never shifts to the Defendant to prove his innocence, but the State must prove that he acted freely and voluntarily beyond every reasonable doubt.

It is fatal constitutional error to prohibit a Defendant from placing before the jury, the trier of fact, every

The Mississippi Supreme Court in its Opinion makes a qualifying statement that "upon the record as made we find no reversible error in the lower court in the trial judge's refusing to accept her deposition into evidence especially where it is not likely that admitting the deposition into evidence would have resulted in a different verdict from that returned". Again it is urged that the testimony of Mrs. Curry was extremely important in corroboration of the Petitioner's testimony. Mrs. Curry's testimony is the Defendant's only independent corroborative evidence in the entire record that there were in fact "two men in a van" other than the testimony of the Petitioner himself. This testimony is particularly critical when viewed with the testimony of the policewoman who originally saw the stationwagon of the Defendant driving away from the scene and saw three men in the vehicle. Mrs. Curry's testimony is the only testimony in the record that corroborates the pursuit of the Petitioner by the two men who were the source of the duress. Mrs. Curry's statement is the only corroborative testimony in the entire record which substantiates the threats made by the two men to the person of Emory Wilson. Even a casual reading of her deposition, or statement, will indicate that her testimony was a vital link in the chain of corroborating circumstances to which this Petitioner perilously clings on the question of his innocence. If prior counsel in the trial court below was in error in not attempting to secure the presence of Mrs. Curry whose testimony is so vital, that error was produced and precipitated by the action of the Prosecuting Attorney in

statement and circumstance which affected his mind and his actions and such statements are never hearsay. Statements by a party, unavailable for cross examination, have been admitted where they bear upon the state of mind of the accused and his affirmative defense. In *Leverett v. State*, 112 Miss. 394, 73 So. 273 (1916), the Mississippi Supreme Court held that it was prejudicial error to exclude previous threats made by the accused when the accused claimed self-defense. The Court said such testimony "was vital to Defendant's case, as corroborative of his own evidence that he acted in self-defense".

As early as 1887 the Mississippi Supreme Court in a case involving assault and battery with intent to murder said "where intent or motive is an element of crime, as it was in this case, evidence of intent or motive is relevant; and, as the strength of the motive may depend upon the cause which produces it, it is competent, in such case, to prove not only the existence of the motive, but also the nature and character of the cause in which it is supposed to have originated". *Bateman v. State*, 64 Miss. 233, 1 So. 172 (1887).

There is authority in Mississippi for allowing the introduction of statements made to the accused when the defense is duress. In *Powe v. State*, 169 So. 763 (Miss. 1936), the accused was allowed to relate to the jury the actual threats that coerced him into setting up a whiskey still.

Other jurisdictions follow the same rationale as the Mississippi Supreme Court in admitting out of court

statements that tend to establish the state of mind of the Defendant. In *United States of America v. Cline*, 570 F.2d 731 (8th Cir. 1978), the Appellant, a non-Indian, was charged with the second degree murder of an Indian. The trial court admitted testimony as to an overheard conversation between the victim and the Defendant which included threats made by the victim to the Defendant. Cline claimed that he had acted in self-defense. He was convicted and sought appeal to the Eighth Circuit Court of Appeals. One of the Appellant's claims of error was that inadmissible hearsay in the form of the victim's threats was admitted at trial. The Appellate Court affirmed stating . . . "The fact that decedent made the statement is evidence from which the jury could infer that Appellant had a motive for killing the decedent. What was said may have had a bearing on the state of mind and the actions of Appellant. Appellant's state of mind was, of course, relevant in determining whether the killing was second degree murder, manslaughter or self-defense. Consequently, the testimony was non-hearsay and admissible." 570 F.2d 731 at 735. The Tenth Circuit Court of Appeals has held that out of court statements made to the accused were admissible in a mail fraud case, *Miller v. United States*, 120 F.2d 968 (10th Cir. 1941). The Defendant had made application to the Blue Sky Board of Kansas for permission to sell $25,000.00 collateralized notes. The application contained a statement of the number of shares of stock and the actual cash investment of the company. The Defendant at trial testified that there was a discussion by stockholders as to what

was meant by the statements in that application. He was not allowed at trial to repeat what was said in the discussion. On appeal, the Tenth Circuit Court of Appeals said, "Intent is an essential element of fraud. Whenever the belief of a person or the motive of his act or conduct is material, he may not only directly testify that he had no intent to defraud, but he may buttress such statement with testimony of relevant circumstances including conversations had with third persons as statements made by them tending to support his statement that he had no intent to defraud."

In *People of the State of New York, Respt., v. Michael Alex, Appt.*, 260 N.Y. 425, 183 N.E. 906 (1933), the Defendant tried to support his contention that his purported confession was not voluntary but was extorted by severe beatings and threats of further physical punishment by showing that at the first opportunity, upon his subsequent arraignment, he complained to the Court that he had been beaten by the police, and offered to exhibit the marks thereof upon his body. The New York Court of Appeals held:

> "That such refusal by the trial court to receive such testimony was highly prejudicial to the defendant, and constitutes reversible error. The defendant had the legal right to have the evidence sought to be elicited by the questions received and considered by the jury upon the issue as to whether the confession was voluntarily made. The refusal to receive it deprived the defendant of a fair trial. An error which prevents the proper con-

> sideration by the jury of the only question relied on by the defendant is substantial, not technical, and we have no right to disregard it, although we may approve of the verdict."

In *Harold Fahy, Petitioner v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), this Court held:

> "The United States Supreme Court is not concerned with whether there was sufficient evidence on which the defendant could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

In that case, the Petitioner was convicted in the lower Court when inadmissible evidence was admitted. In examining the *Fahy* case, a clear analogy can be drawn to the present case. If it is grave error to admit against a Defendant evidence which is inadmissible, it is an even greater error to fail to admit relevant evidence which is admissible and important to his defense. It follows, as a matter of course, that a Petitioner is entitled, in such a case, to show a lack of an essential element such as intent in a robbery. Such evidence may be introduced either to contest the evidence produced by the prosecution, or to establish affirmatively the lack of the required criminal intent. Petitioner herein submits that such errors prejudiced his right to due process and an impartial trial.

In those circumstances where a violation of a right protected by the Federal Constitution occurs, this Court, as ultimate arbiter in interpreting and implementing constitutional guarantees has set a standard by which errors are declared prejudicial or harmless.

> "Before an error involving the denial of a federal constitutional right can be held harmless in a state criminal case, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction." *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 24 ALR 3d 1065 at 1072 (1967).

Citing *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), this Court further stated:

> "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless".

Certainly the converse must be true that an error in excluding plainly relevant and admissible evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless. *Chapman* dealt with improper comments by the Prosecuting Attorney and instructions by the Court on the Defendant's failure to testify. The Court clarified the issue of upon whom the burden rested to show that a constitutional violation was harmless error.

> "Certainly, error, constitutional error, in illegally admitting highly prejudicial evidence or

> comments (or excluding relevant admissible evidence in the Defendant's favor) casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless error rule put the burden on the beneficiary of the error either to prove that there was no injury as to suffer a reversal of his erroneously obtained judgment." *Chapman, supra.*

The forerunner of *Chapman* was *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The issue there was whether a jury instruction erroneously granted was "harmless". This Court postulated that "the question is, not were they (the jury) right in their judgnent regardless of the error, as its effect upon the verdict. It is rather what effect the error had, or reasonably may be taken to have had, upon the jury's decision." 328 U.S. 750 at 764. Justice Rutledge writing for the majority continued,

> "If, when all is said and done, the conviction is (such) that the error did not influence the jury or had but very slight effect, the verdict and the judgment should stand . . . But if one cannot say, with fair assurance after pondering all that happened, without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affect-

ed by the error. It is rather, even so, whether the error itself had substantial influence. If so, as if one is left in grave doubt, the conviction cannot stand". 328 U.S. 750, at 764-65.

It is respectfully urged that the Petitioner was denied due process of law under the Fourteenth Amendment and the right of a fair trial by jury under the Sixth Amendment to the Constitution of the United States because of the error committed in the evidentiary rulings of the trial court, and that in the light of present day constitutional law this Court cannot hold it to be harmless unless it be shown beyond a reasonable doubt that the error did not contribute to the Petitioner's conviction.

It might be pointed out to this Court that it is well settled that a "Defendant who, without opportunity to escape, has well-grounded fear of imminent death or serious injury unless he complies with his captor's wrongful commands entertains mental state recognized as exculpatory with respect to most crimes and compulsion or duress producing this state of mind is defense to most criminal accusations." *U.S. v. Hearst*, 563 F.2d 1331 (9th Cir., 1977).

In the present case, by the trial court's refusal to admit the communicated threats made to the Petitioner, the Petitioner has been effectively denied the right to assert the defense of coercion or duress. As set forth by the 9th Cir. in the *Hearst* case, there is a presumption that every Defendant's actions were free from duress,

but once evidence of duress is received, this presumption disappears and the burden is placed upon the prosecution to prove that a Defendant's actions were free from duress beyond a reasonable doubt. The prosecution in the trial below did not have to overcome this presumption beyond a reasonable doubt because no evidence of the duress defense was allowed to be placed before the jury. Due process of law as required by the Fifth and Fourteenth Amendments to the Constitution requires that the Defendant have the opportunity to assert such a defense and as set forth in the *Hearst* case duress or coercion is a defense that under the proper circumstances can be exculpatory of the Defendant's actions.

II.

The Petitioner Was Denied His Sixth Amendment Right To Effective Counsel

The right to a hearing is a basic element of due process and includes the right to the aid of effective counsel. *Powell v. Alabama*, 287 U.S. 45 (1932), 53 S.Ct. 55, 77 L.Ed. 158, *McKenzie v. State*, 233 Miss. 216, 101 So.2d 651 (1958).

It is the contention of the Petitioner that he was not adequately and effectively represented by his prior counsel at the trial court level.

The record indicates several instances, the totality of which tend to show that the Petitioner was not effectively represented at the trial court level by former

counsel. The attorney for the Petitioner at the trial failed to recognize the fact that communicated threats to the Petitioner were admissible evidence. Not only did the former attorney for the Petitioner fail to proffer the communicated threats to the Court out of the presence of the jury, but proceeded in systematically preventing the Petitioner from testifying as to the threats without first an objection from the prosecution.

The Petitioner's attorney in the trial court, being met with a constant objection from the District Attorney, all of which were sustained by the Court as to any threats made upon the Petitioner, finally joined the State in suppressing the Petitioner's testimony on the vital issue of duress and particularly at the time of the robbery itself. Examples of this are found throughout the record, but perhaps the greatest abuse is indicated as follows:

> "BY MR. CONNER: Colonel, I want you to state exactly what the man said to you verbatim.
>
> BY MR. PHILLIPS: Objection, Your Honor.
>
> BY THE COURT: Sustained.
>
> BY MR. WILSON: The man, he was evidently in a rush. He came up to me and wanted to know, 'Where in the world, you S.O.B., where in the world you been?' And I said, 'What do you mean?' And he said, —
>
> BY MR. PHILLIPS: Objection, Your Honor.
>
> BY THE COURT: Sustained.

BY MR. CONNER: You can't tell the conversation, Colonel, but you can tell what the man did to you.

BY MR. WILSON: He knocked me down and knocked my breath out. He knocked my glasses off and I had to find them. And I finally found them and I went to my car and when I got to my car I had a shotgun on my back.

BY MR. CONNER: And what was the order given to you with the shotgun in your back?

BY MR. PHILLIPS: Objection, Your Honor.

BY THE COURT: Sustained.

BY MR. CONNER: What did you do when that shotgun was on you?

BY MR. WILSON: I obeyed him, sir. I was instructed to follow the blue-black van. At first I said I wouldn't go, and I asked him what was going on. And he told me . . .

BY MR. WEATHERS: Object to what he told him. That's hearsay.

BY THE COURT: Sustained.

BY MR. CONNER: *Colonel, I realize you are not acquainted with rules of evidence. I just want you to tell this Court and jury what you did . . .*

BY MR. WILSON: I followed the van truck off the interstate. Blake Brown was in the front seat opposite me with the shotgun in his lap. He was cursing me and he was upset because he said that if

you ruin — he was threatening my life. And he told me that he was going to blow my head off if I didn't cooperate.

BY MR. WEATHERS: Objection, Your Honor.

BY THE COURT: Sustained. Jury, you will disregard that response concerning conversation. The record will be stricken of it. Mr. Conner, this is your witness and you will direct questions to him that are not suggestive of an answer, please.

BY MR. WILSON: I continually got hit on the head and the shotgun was continuously jammed in my side. I was instructed to . . .

BY MR. CONNER: Please, sir, just tell what occurred without telling your instructions.

BY MR. WILSON: When I got out, the man in the van put a shotgun on me immediately.

BY MR. CONNER: What did you do?

BY MR. WILSON: I obeyed orders.

BY MR. CONNER: Sir?

BY MR. WILSON: I obeyed his orders.

BY MR. CONNER: Well, I understand that, sir, but you can't tell it. I am asking you to tell what you did."

The proposition that communicated threats when offered to show the state of mind or apprehensiveness of the listener, rather than to show the truth or falsity of the statement, are admissible as non-hearsay, is a clear point of law. *Evans v. State,* 315 So.2d 1 (Miss. 1975). In general, errors by counsel in clear matters of

law establish incompetency per se. A tactical move that may have been acceptable if made for correct reasons may be grounds for reversal if known to be based on erroneous judgments as to the law. The cases of *Poe v. United States*, 233 F.Supp. 173, (D.D.C. 1964) 352 F.2d 639 and *People v. Ibarra*, 60 Cal. 2d 460, 386 P.2d 487 (1963) 34 Cal. R. 863 stand for the proposition that error on a clear matter of law renders even a decision on trial tactics a breach of counsel's duty to his client.

The guarantee of effective counsel is not an illusory theory, but a genuine positive command, and without it due process of the law is impossible. *Stewart v. State*, 229 So.2d 53 (Miss. 1969). Based on the totality of the circumstances, the Petitioner in this case was not adequately or effectively represented by prior counsel at the trial court level and, thus, was denied his constitutional right to effective counsel. *United States v. De Coster*, 487 F.2d 1197 (D.C. 1973); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); and *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974).

III.

The Petitioner Was Denied Due Process Of Law By The Ruling Of The Trial Court In Refusing To Admit Into Evidence The Deposition Of A Witness Which Constituted A Stipulated Statement Of A Witness By Agreement Between The State of Mississippi And The Petitioner Which Resulted In Grave Injustice To The Petitioner.

In its Opinion, the Mississippi Supreme Court refers to a deposition which was reduced to writing by a

court reporter on October 26, 1978, of the witness Mrs. Lillie Curry which statement or deposition was taken in Andalusia, Alabama by agreement between Wilson's prior counsel and Forrest County, Mississippi Prosecuting Attorney. As pointed out in the Opinion, the deposition contained a provision that "each party reserves the right to offer all or any part thereof of the deposition for evidence at the trial". The record reveals that after the State of Mississippi entered into this stipulation with counsel for the Petitioner, no objection was ever made by the State of Mississippi to the introduction of the statement of Mrs. Curry into evidence. The then counsel for the Petitioner in the lower court was, therefore, totally caught by surprise when the Court, on the third day of the trial, on its own motion, and without objection from the state, rejected the deposition or statement of Mrs. Curry and prevented the jury from hearing her testimony. The Mississippi Supreme Court notes in its Opinion that the reason why Mrs. Curry was not available to testify was not clearly revealed by the record and that she was not subpoenaed as a witness. The Petitioner respectfully urges that the record clearly reveals why Mrs. Curry was not subpoenaed and that is found in the record and in the Opinion of the Mississippi Supreme Court when it is shown that the State had in fact agreed to the introduction of the statement at the trial and had no objection thereto. Petitioner urges, therefore, that it is patently unfair to the Petitioner herein to affirm the error of the trial court in its arbitrary action in rejecting on its own motion facts which had been agreed to by the State of Mississippi and the Petitioner.

the court below who misled counsel for the Petitioner by agreeing to the taking of the deposition of Mrs. Curry and who never thereafter objected to its introduction. The trial judge was not a party to that agreement and he therefore had no authority to rule it an invalid agreement on his own motion. If the State of Mississippi in the trial court below intended to object to the introduction of the statement or deposition of Mrs. Curry and had given adequate notice of its objection, or had filed a Motion in Limine to properly bring the motion to the attention of the trial judge before the fatal day on which the trial judge on his own motion ruled it inadmissible, then counsel in the court below could have produced the witness in person and met the objection that the Mississippi Supreme Court raised in its Opinion. It is respectfully urged the Court that there was error in the action of the trial court in excluding Mrs. Curry's deposition and that under the constitutional standards prevailing, this Court cannot overlook such error.

IV.

The Mississippi Supreme Court Erred In Its Construction And Interpretation Of The Record Of Testimony In Trial Court And Relied On Such Misconstruction In Applying Its Decision On The Law Resulting In The Affirmance Of The Conviction Of The Petitioner And Thus A Failure Of Due Process Of Law.

The Opinion of the Mississippi Supreme Court in this case concedes that the Petitioner has adequately

raised a constitutional issue and succinctly states that constitutional issue on page 4 of the Opinion.

> "Wilson's contention is that in sustaining the prosecution's objection the trial court denied him his rights guaranteed under the Fourteenth Amendment of the United States Constitution which states in part:
>
> > 'That no state shall deprive any person of life, liberty or property without due process of law.' "

The issue then of a Federal constitutional question was admittedly squarely before the Mississippi Supreme Court in this case. The Opinion then distinguishes *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973) and in doing so states that "Chambers is patently distinguishable from the case at bar because in the present case there was no other corroborative evidence as to the alleged statements made to Wilson by Brown who was not available for cross examination by the state. It is difficult to understand the distinction that is here made between *Chambers v. Mississippi* and the instant case by the Mississippi Supreme Court. As was said in *Chambers:*

> "Petitioner's contention asserted before the trial court on Motion for a New Trial and subsequently before the Mississippi Supreme Court is that he was denied 'fundamental fairness guaranteed by the Fourteenth Amendment' as the result of several evidentiary rulings. His claim, the substance

of which we accept in this Opinion, rests on the cumulative effect of those rulings, in frustrating his efforts to develop exculpatory defense."

In *Chambers* the evidence was based on an evidentiary rule primarily concerning itself with an evidentiary state rule involving (1) inability of a party to impeach his own witness, and (2) the hearsay rule to preclude the accused from introducing testimony critical to his defense. The rule announced by this Court in that case, it is respectfully urged, is directly in point in the consideration of this case and that the ultimate impact rule, if it may be so called, as referred to in that case by this Court, is much more evident in the instant case than in the *Chambers* case. There Chambers claimed that denial of due process because of the ultimate impact of that error, when viewed in conjunction with the trial court, refused to permit him to call other witnesses. Here the overwhelming cumulative effect of the rulings of the lower court in denying Wilson's right to testify to those declarations made by Blake Brown and the man called John, before, during and immediately after the robbery, combined with the Court's refusal to admit the deposition of Mrs. Curry as covered in Argument III patently, we submit, denied Wilson fundamental fairness guaranteed by the Fourteenth Amendment and pronounced vigorously by *Chambers*. The Mississippi Supreme Court, in its Opinion, conceded that such rulings were in error but the Court says there was ample other opportunity for Wilson to put forth his defense of duress and the Court's rulings, though error, are harmless because the matter was "mitigated" by his

answers during cross examination by the County Attorney. A Defendant on trial for any serious criminal offense is entitled by and through his counsel on direct examination to present all matters which he believes give weight and credence to his plea of not guilty and subsequently to his innocence. He should never be required by any court to rely solely upon those answers which are invoked as a result of the heated and vigorous cross examination of the prosecutor. The Mississippi Supreme Court, in its Opinion, has ruled factually that Wilson, though denied opportunity by the trial court in the direct presentation of his case, had ample opportunity to do so and a fair trial because of his answers to the County Attorney under cross examination. The Mississippi Supreme Court states in its Opinion:

> "Actual statements made by the other two participants in the armed robbery would have been cumulative of an abundance of testimony heard by the jury as to duress. Wilson was liberally allowed to present his defense of duress to the jury . . ."

It is respectfully submitted that the record lends itself to no such conclusion unless the Court requires this Defendant to rely upon the cross examination of the prosecution to prove his own case.

CONCLUSION

It is respectfully submitted that this Court review the strong Dissent filed by Justice Walker of the Mississippi Supreme Court on the denial for Petition for

Rehearing which was joined by three other justices, including the Chief Justice, of that tribunal. Justice Walker's Dissent clearly and succinctly establishes constitutional violations which have occurred in this unusual case which have, unfortunately, left the Petitioner facing a twenty (20) year sentence for armed robbery without parole. By a five to four decision, the Petitioner, aged 52, has effectively been incarcerated for the rest of his natural life without the opportunity to ever present his defense of duress before a jury of his peers. It is submitted that this Court should grant this Petition and issue a Writ of Certiorari to the Mississippi Supreme Court.

Respectfully submitted,

EMORY M. WILSON, PETITIONER

BY: BOYCE HOLLEMAN AND
BEN F. GALLOWAY,
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CERTIFICATE

I, the undersigned counsel, do hereby certify that I have this day forwarded via United States Mail, postage prepaid, true and correct copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Mississippi to Attorney General William Allain, Post Office Box 220, Jackson, Mississippi 39205.

This the ____ day of January, 1981.

OF COUNSEL

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 51,869

EMORY M. WILSON

v.

STATE OF MISSISSIPPI

Filed: June 4, 1980

BEFORE SMITH, BROOM AND COFER

BROOM, JUSTICE, FOR THE COURT:

Armed robbery conviction and sentence of twenty years imprisonment resulted from trial of the defendant Emory M. Wilson in the Circuit Court of Forrest County. His defense, refused by the jury, was that he participated under "duress."[1] Wilson appeals contending that the lower court committed reversible error as to (1) evidentiary rulings, (2) severity of the sentence, (3) refusal of a jury instruction, and (4) he asserts that his trial counsel was neither competent nor effective. We affirm.

---

1 Duress is a valid defense for many crimes including robbery; Homicide is an exception. Watson v. State, 212 Miss. 788, 55 So.2d 441 (1951).

According to the testimony, the defendant Wilson (either alone or acting jointly with others) robbed three U.S. Army Reserve Officers of approximately $27,000 cash payroll money which they were about to pay to Army Reserve students at the University of Southern Mississippi (USM). Wilson had previously commanded a school conducted for the military on the USM campus. The officers had brought the money from Camp Shelby and had proceeded to Elam Arms Dormitory, USM. While getting out of the car, the officers heard a voice say, "Don't you go in there. Don't you go in there." Then observed by the officers was a man, with a rifle pointing at them, who stated, "I have two other men behind the fence with shotguns. I want you to put the bags down and go inside the building and lay face down on the floor." None of the officers were subsequently able to identify the man's face, because he was wearing a "ski mask" or "navy watch cap" over his head. The officers left the money on the pavement, went inside the Elam Arms Dormitory and lay face down on the floor as they were ordered to do. After hearing a sound like a chain going through the door handle, and waiting a short time without hearing anything else, they ran to the door which they found locked. They promptly notified the authorities and an investigation began.

Wilson, a Colonel in the Army Reserve, was subsequently implicated and jailed in Fulton County, Georgia from where he waived extradition. According to Wilson, his involvement in the robbery came about in a

most unusual manner. He states that in 1977, he was given a telephone number of a man named Blake Brown, who "loaned money at high rate interest". Wilson called Brown, and after several meetings with Brown in the Atlanta, Georgia area, obtained a $3,000 loan from him. Wilson's introduction to Brown came through a woman known only as Linda (she did not testify), with whom Wilson admitted having had an affair.

Further testimony of Wilson (though rejected by the jury) is summarized as follows. In July of 1978, when he had not repaid this loan, Brown ordered him to come to Hattiesburg, Mississippi from Indiantown Gap, Pennsylvania. Because Brown threatened to burn his business and threatened Wilson's wife and children, Wilson came to Mississippi and met Brown in Hattiesburg as instructed. There Brown beat him up and threatened him further, after which another man known to him only as "John" joined them. Detailed plans were made by Brown and John pursuant to which the three of them (Wilson driving) proceeded to Elam Arms where Wilson remained in the car with Brown while John went some place. John shortly came back, jumped in the back seat, and they all left.[2] After driving down a road, they stopped at a dead end where the other two men fled thinking a police car was coming. Wilson then

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2 A light colored station wagon occupied by three people was observed leaving the area by a law officer who wrote down the license tag number — investigation disclosed the vehicle was that of Wilson.

found in his car the money taken in the robbery, and headed back to Georgia as instructed. At Andalusia, Alabama he stopped for gas and discovered a rifle, which he had not previously known was there, on the back seat of the car.

Wilson stated that this rifle was an M1-30 carbine which he had at one time owned. He sold the rifle to Blake Brown for $800, and when told the going rate for such a rifle was $114.95, he said that he thought it strange Brown would pay such a price, but took the money anyway.[3]

Upon arrival in Atlanta, he went to the Alamo Plaza Motel and registered as instructed in the name of James Brown. He hid the money behind a restaurant but subsequently surrendered to authorities, and turned in the money, and within a day or two was back in Mississippi. Other testimony will be stated where appropriate herein.

Wilson asserts that he was denied due process of law when the lower court excluded certain testimony consisting of threats communicated to him. While testifying, Wilson was asked to repeat what one of the other two alleged participants in the robbery said to him as a

---

3 Although Wilson claimed to have been threatened with a shotgun during the whole period of the robbery, no shotgun was left in the car, only the rifle. Brown and "John" apparently took the shotgun but left the money and the rifle.

direct threat, but the prosecutor's objection (hearsay) was sustained. The following example is excerpted from the record of Wilson's testimony:

> BY MR. CONNER: Please tell the jury the threats as it pertained to your life, of exposure of your infidelity, or danger to your family or whatever it was that made you come to a rendevous. . . Colonel, I want you to state exactly what the man said to you verbatim.
>
> BY MR. PHILLIPS: Objection, Your Honor.
>
> BY THE COURT: Sustained.
>
> BY MR. WILSON: The man, he was evidently in a rush. He came up to me and wanted to know, "Where in the world, you S.O.B., where in the world you been?" And I said, "What do you mean?" and he said, —
>
> BY MR. PHILLIPS: Objection, Your Honor.
>
> BY THE COURT: Sustained.

Suggestive and leading aspects of the query are obvious but were not basis of the objection. Wilson's contention is that in sustaining the prosecution's objection, the trial court denied him his rights guaranteed under the Fourteenth Amendment of the United States Constitution, which states in part:

> [T]hat no state shall deprive any person of life, liberty, or property without due process of law.

Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973) is relied upon in support of Wilson's contention that hearsay testimony critical to his defense, may not be mechanistically excluded to defeat the ends of justice. *Chambers* is patently distinguishable from the case at bar because in the present case there was no other corroborating evidence as to the alleged statements made to Wilson by Brown, who was not available for cross-examination by the state. Additionally, *Chambers* had in it the element of declaration against interest but here it cannot be said that the threats which Wilson sought to introduce constituted declarations against him.

Argument is made that the testimony of detailed threats made to Wilson would have shown his reasonable apprehension of danger or state of mind under *Harley v. State*, 345 So.2d 1048 (Miss. 1977) and *Evans v. State*, 315 So.2d 1 (Miss. 1975). In *Harley*, we stated that:

> It was fatal error to exclude this testimony because it was offered not for the truthfulness of the threats but merely to show the apprehensive state of mind of the defendant at the time of the fatal encounter.
> (345 So.2d at 1050).

Handshoe, et al v. Daly, et al, 211 Miss. 189, 51 So.2d 230 (1951) held that:

> This testimony was admissible as an independently relevant fact to explain the circumstances under which these particular claimants furnished the materials for which they were claiming, and the truth or falsity of Handshoe's quoted statement was not a fact in issue, and hence the hearsay rule does not apply.
> (211 Miss. at 193).

In resolving this issue, we are mindful that Wilson was allowed to fully explain to the jury that he was at all times during the commission of the armed robbery "covered with a shotgun", and in awesome fear of the other two alleged participants in the robbery. Also, he was allowed to describe in great detail that his business had been threatened, his children had been threatened, and he himself had been threatened over the telephone when Blake Brown called him. Actual statements made by the other two participants in the armed robbery would have been cumulative of an abundance of testimony heard by the jury as to duress. Wilson was liberally allowed to present his defense of duress to the jury and relate to them that he was at all times during the course of the robbery in fear of his life, and fearful of other threatened calamities. It is noted here that Wilson (in response to a telephone call) placed himself in the hands of the other two participants in the

armed robbery without making any attempt to invoke the aid and assistance of the authorities in any state from Pennsylvania to Mississippi. Also, he had ample opportunity to contact the Mississippi and/or Georgia authorities after the commission of the robbery but elected not to do so, although he did eventually surrender the money to the Army at Fort McPherson, Georgia. *Harley, supra,* did not say and does not mean that reversible error occurs every time testimony of this type is excluded. Exclusion here resulted in a large measure from sustaining objections to questions which were both leading and quite suggestive of answers. Again, as noted above, the defendant was allowed to freely testify time and again that threats against his children, his business, his life, and to expose his acts of infidelity were made prior to the robbery. Further, he testified that at all times during the actual commission of the robbery a shotgun was poked in his side, with Blake Brown's finger on the trigger. According to Wilson's testimony which the jury heard, it is obvious that at all times he claimed to be acting in response to mortal fear for his life, family, and property. Indeed, after the robbery when the three went back to the van and then went down the dead end street where he was left with the money and the gun, he was afraid he was going to "get his brains blown out."

Upon the testimony, exclusion of the actual statements made by Blake Brown was error but does not require reversal. Heard by the jury was abundant and repeated testimony on Wilson's theory that he was not a

voluntary actor. With the great amount of testimony and evidence as to the defense of duress, which went to the jury, the actual statements claimed to be made by Blake Brown to Wilson before, during and after the robbery were cumulative of other testimony and not essential to the defendant's case.

Wilson also contends that the following exchange which took place at the trial was a fatal blow to his right to a fair trial and due process of law. The exchange referred to is as follows:

> BY MR. CONNER: Colonel, I'm going to ask you a question. Did you voluntarily participate in that robbery?
>
> BY MR. WEATHERS: Objection, Your Honor. That's improper. That's for this jury to determine.
>
> BY THE COURT: Sustained.
>
> BY MR. CONNER: Did you plan that robbery?
>
> BY MR. WILSON: No sir.
>
> BY MR. WEATHERS: Objection, Your Honor. Same reason.
>
> BY THE COURT: Sustained. Jury, you'll disregard the response to that question. The record will be stricken of that response.

Wilson contends this was fatal to his case because the trial judge by his actions told the jury to "disregard his response" meaning that the jury should disregard the defendant's denial of guilt. This is simply not the case because what the judge said could not logically have been accepted by jurors as instruction to disregard Wilson's acting under duress. Moreover, a later exchange on cross-examination was in mitigation of the matter. The later exchange was:

> Q. [BY COUNTY ATTORNEY PHILLIPS]: Truth of the matter is, Colonel, that you pulled that robbery, knew you were caught, and you did everything in your power after you found out they had you to cover it up, just like you're covering it up today, didn't you Colonel?
>
> A. No, sir.
>
> BY HON. DUDLEY W. CONNER:
> If Your Honor please, I can't hear the question.
>
> BY HON. GEORGE L. PHILLIPS:
> No further questions.
>
> BY THE COURT:
> You may repeat the question, counsel. He didn't hear it.
>
> Q. I said the truth of the matter is that you pulled the robbery and you found out you were caught and then you started doing

everything in your power to cover your tracks from day one, just like you're sitting up here doing today, isn't it, Colonel?

A. No, sir, and I've told you that since I've been here.

This exchange on cross-examination emphasized to the jury that Wilson denied his guilt, and would again re-emphasize the fact that he claimed his actions resulted from duress. Therefore, this particular aspect of Wilson's argument does not merit reversal.

Next Wilson argues that the lower court erred in refusing to allow into evidence parts of a deposition of one of defendant's witnesses taken before trial. On October 26, 1978, the witness, Mrs. Lillie Curry, was deposed in Andalusia, Alabama, in the presence of Wilson's counsel and the Forrest County Prosecutor. In the deposition was a provision that "each party reserves the right to offer all or any part thereof of the deposition for evidence at the trial. . . ." On the third day of the trial the court was first made aware of the deposition at which time it was stated that Mrs. Curry had cancer and belonged to a "cult" which didn't believe in the taking of medication. Upon the record as made we find no reversible error in the refusal of the court to admit the deposition into evidence, especially since the deposition contained inadmissible testimony.

Exactly why Mrs. Curry was not available to testify in person at the trial was not clearly revealed by the record. She was not subpoenaed to appear before the trial and no effort to procure her presence was made under our Uniform Witness Attendance Law: Mississippi Code Annotated §99-9-27, et seq. (1972). Early in our jurisprudence in *Dominges v. State,* 15 Miss. (7 Smedes & Marshall) 475 (1846) we spoke on the subject of depositions and said:

> The system of criminal jurisprudence appears to require the presence of the witnesses, both for and against the accused. Very often, in such prosecutions, much depends upon the appearance, manner and mode of testifying of a witness, and it is this that adds the superior character and importance to oral testimony.
>
> The practice in criminal cases of proposing to admit what was expected to be proved by absent witnesses, is not calculated to advance the ends of public justice; and if indeed regular and competent, should not be allowed or encouraged except in very extreme cases. (15 Miss. at 477, 478).

Contained in Mrs. Curry's deposition was testimony that she remembered Col. Wilson stopping at her gas station to purchase gas in Alabama on the date of the robbery. She stated that after Wilson left or as he was leaving, a dark colored van containing two men

pulled up to get gas but we note that she was unable to identify either of them. Upon the record as made, we find no reversible error in the lower court in the trial judge's refusing to accept her deposition into evidence especially where it is not likely that admitting the deposition into evidence would have resulted in a different verdict from that returned.

Next argued on behalf of Wilson is his contention that he was denied due process of law in that he was not represented by competent and effective counsel. The record shows Wilson was represented by a member of the State of Georgia Bar and by the Hon. Dudley W. Conner, an outstanding member of the Mississippi State Bar — these men were retained counsel, not court appointed. We stated in *Miller v. State,* 231 So.2d 178 (Miss. 1970) that "An accused who retains his own attorney waives his right to complain of his counsel's competency. *King v. State,* 374 So.2d 808 (Miss. 1979) held that a defendant in a criminal case on appeal "may not here complain that he was not properly represented" where it appears at the trial level he had counsel of his own choice. Looking at the record on the case as a whole, our opinion is that Wilson was fairly and vigorously defended. The record does not show that the conduct of Wilson's trial counsel was so lacking in diligence and competence as to reduce the trial to a farce or a mockery, nor could it shock the conscience of the court.

Another assertion made on the appeal of Wilson is that the lower court erred in imposing a 20-year sentence because the sentence was excessive and not reasonably calculated to be less than life. Under the applicable statute, conviction could have carried with it a sentence of life imprisonment, if imposed by the jury. Wilson argues that he is approximately 50 years old with a 22-year life expectancy and therefore his sentence is not reasonably expected to be less than a life sentence. We held in *Stewart v. State*, 372 So.2d 257 (Miss. 1979) that:

> Upon remand, the trial court will make a record of and consider all relevant facts necessary to fix a sentence for a definite term reasonably expected to be less than life. The court should consider the age and life expectancy of the defendant and any other pertinent facts which would aid in fixing a proper sentence. (372 So.2d at 259).

In the case now on appeal here, it is obvious to us that under *Stewart, supra*, the trial judge considered "other pertinent facts which would aid in fixing a proper sentence." In handing down the sentence, the sentencing judge noted that Wilson's attitude was not that of one who felt "sorry for the things he's been involved in." It is also obvious that the sentencing judge considered the fact that Wilson's alleged principals: Blake Brown or the man known as John, had not been brought to justice. Wilson appears to be the only person introduced in

the trial who could have supplied information about the other two. We are unable to say that the sentence at issue is unduly excessive or that it violates our established standards.

Last argument made is that the court erred in refusing to grant one of the jury instructions (D-3 requested by Wilson). The reason stated below by the trial court in refusing to grant D-3 was that it had already granted D-5, which the court felt was inclusive of the substance of D-3. Careful reading and scrutiny of the two instructions reveal that they are based on "substantially the same theory" and therefore the trial judge did not abuse his sound discretion in rejecting D-3.

Looking at the record as a whole, along with very excellent briefs and oral arguments, we perceive this case as one where the accused did not get a perfect trial, but did get a fair trial which lacked any grievous or prejudicial error. His defense of duress was founded upon activities of the other two mysterious principals in the crime and a female named "Linda", none of whom appeared at the trial and testified. The jury, as it had a right to do, rejected Wilson's theory of the case and we cannot say that reversible error is demonstrated in the record.

AFFIRMED.

PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J., SUGG, WALKER, LEE, BOWLING and COFER, JJ., CONCUR.

APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI

WEDNESDAY, DECEMBER 3, 1980,
COURT SITTING:

EMORY M. WILSON

versus #51,869

STATE OF MISSISSIPPI

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied, original opinion modified, and this Court doth order that said Petition be and the same is hereby denied.

MINUTE BOOK "BU", page 477.

APPENDIX "C"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 51,869

EMORY M. WILSON

v.

STATE OF MISSISSIPPI

Dated: Dec. 3, 1980

BEFORE SMITH, BROOM AND COFER

BROOM, JUSTICE, FOR THE COURT:

Armed robbery conviction and sentence of twenty years imprisonment resulted from trial of the defendant Emory M. Wilson in the Circuit Court of Forrest County. His defense, refused by the jury, was that he participated under "duress."[1] Wilson appeals contending that the lower court committed reversible error as to (1) evidentiary rulings, (2) severity of the sentence, (3) refusal of a jury instruction, and (4) he asserts that his trial counsel was neither competent nor effective. We affirm.

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1 Duress is a valid defense for many crimes including robbery; Homicide is an exception. Watson v. State, 212 Miss. 788, 55 So.2d 441 (1951).

According to the testimony, the defendant Wilson (either alone or acting jointly with others) robbed three U.S. Army Reserve Officers of approximately $27,000 cash payroll money which they were about to pay to Army Reserve students at the University of Southern Mississippi (USM). Wilson had previously commanded a school conducted for the military on the USM campus. The officers had brought the money from Camp Shelby and had proceeded to Elam Arms Dormitory, USM. While getting out of the car, the officers heard a voice say, "Don't you go in there. Don't you go in there." Then observed by the officers was a man, with a rifle pointing at them, who stated, "I have two other men behind the fence with shotguns. I want you to put the bags down and go inside the building and lay face down on the floor." None of the officers were subsequently able to identify the man's face, because he was wearing a "ski mask" or "navy watch cap" over his head. The officers left the money on the pavement, went inside the Elam Arms Dormitory and lay face down on the floor as they were ordered to do. After hearing a sound like a chain going through the door handle, and waiting a short time without hearing anything else, they ran to the door which they found locked. They promptly notified the authorities and an investigation began.

Wilson, a Colonel in the Army Reserve, was subsequently implicated and jailed in Fulton County, Georgia from where he waived extradition. According to Wilson, his involvement in the robbery came about in a

most unusual manner. He states that in 1977, he was given a telephone number of a man named Blake Brown, who "loaned money at high rate interest". Wilson called Brown, and after several meetings with Brown in the Atlanta, Georgia area, obtained a $3,000 loan from him. Wilson's introduction to Brown came through a woman known only as Linda (she did not testify), with whom Wilson admitted having had an affair.

Further testimony of Wilson (though rejected by the jury) is summarized as follows. In July of 1978, when he had not repaid this loan, Brown ordered him to come to Hattiesburg, Mississippi from Indiantown Gap, Pennsylvania. Because Brown threatened to burn his business and threatened Wilson's wife and children, Wilson came to Mississippi and met Brown in Hattiesburg as instructed. There Brown beat him up and threatened him further, after which another man known to him only as "John" joined them. Detailed plans were made by Brown and John pursuant to which the three of them (Wilson driving) proceeded to Elam Arms where Wilson remained in the car with Brown while John went some place. John shortly came back, jumped in the back seat, and they all left.[2] After driving down a road, they stopped at a dead end where the other two men fled thinking a police car was coming. Wilson then

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2 A light colored station wagon occupied by three people was observed leaving the area by a law officer who wrote down the license tag number — investigation disclosed the vehicle was that of Wilson.

found in his car the money taken in the robbery, and headed back to Georgia as instructed. At Andalusia, Alabama he stopped for gas and discovered a rifle, which he had not previously known was there, on the back seat of the car.

Wilson stated that this rifle was an M1-30 carbine which he had at one time owned. He sold the rifle to Blake Brown for $800, and when told the going rate for such a rifle was $114.95, he said that he thought it strange Brown would pay such a price, but took the money anyway.[3]

Upon arrival in Atlanta, he went to the Alamo Plaza Motel and registered as instructed in the name of James Brown. He hid the money behind a restaurant but subsequently surrendered to authorities, and turned in the money, and within a day or two was back in Mississippi. Other testimony will be stated where appropriate herein.

Wilson asserts that he was denied due process of law when the lower court excluded certain testimony consisting of threats communicated to him. While testifying, Wilson was asked to repeat what one of the other two alleged participants in the robbery said to him as a

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3 Although Wilson claimed to have been threatened with a shotgun during the whole period of the robbery, no shotgun was left in the car, only the rifle. Brown and "John" apparently took the shotgun but left the money and the rifle.

direct threat, but the prosecutor's objection (hearsay) was sustained. The following example is excerpted from the record of Wilson's testimony:

> BY MR. CONNER: Please tell the jury the threats as it pertained to your life, of exposure of your infidelity, or danger to your family or whatever it was that made you come to a rendevous. . . Colonel, I want you to state exactly what the man said to you verbatim.
>
> BY MR. PHILLIPS: Objection, Your Honor.
>
> BY THE COURT: Sustained.
>
> BY MR. WILSON: The man, he was evidently in a rush. He came up to me and wanted to know, "Where in the world, you S.O.B., where in the world you been?" And I said, "What do you mean?" and he said, —
>
> BY MR. PHILLIPS: Objection, Your Honor.
>
> BY THE COURT: Sustained.

Suggestive and leading aspects of the query are obvious but were not basis of the objection. Wilson's contention is that in sustaining the prosecution's objection, the trial court denied him his rights guaranteed under the Fourteenth Amendment of the United States

Constitution, which states in part:

> [T]hat no state shall deprive any person of life, liberty, or property without due process of law.

Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973) is relied upon in support of Wilson's contention that hearsay testimony critical to his defense, may not be mechanistically excluded to defeat the ends of justice. *Chambers* is patently distinguishable from the case at bar because in the present case there was no other corroborating evidence as to the alleged statements made to Wilson by Brown, who was not available for cross-examination by the state. Additionally, *Chambers* had in it the element of declaration against interest but here it cannot be said that the threats which Wilson sought to introduce constituted declarations against him.

Argument is made that the testimony of detailed threats made to Wilson would have shown his reasonable apprehension of danger or state of mind under *Harley v. State*, 345 So.2d 1048 (Miss. 1977) and *Evans v. State*, 315 So.2d 1 (Miss. 1975). In *Harley*, we stated that:

> It was fatal error to exclude this testimony because it was offered not for the truthfulness of the threats but merely to show the apprehensive state of mind of the defendant at the time of the fatal encounter.
> (345 So.2d at 1050).

Handshoe, et al v. Daly, et al, 211 Miss. 189, 51 So.2d 230 (1951) held that:

> This testimony was admissible as an independently relevant fact to explain the circumstances under which these particular claimants furnished the materials for which they were claiming, and the truth or falsity of Handshoe's quoted statement was not a fact in issue, and hence the hearsay rule does not apply.
> (211 Miss. at 193).

In resolving this issue, we are mindful that Wilson was allowed to fully explain to the jury that he was at all times during the commission of the armed robbery "covered with a shotgun", and in awesome fear of the other two alleged participants in the robbery. Also, he was allowed to describe in great detail that his business had been threatened, his children had been threatened, and he himself had been threatened over the telephone when Blake Brown called him. Actual statements made by the other two participants in the armed robbery would have been cumulative of an abundance of testimony heard by the jury as to duress. Wilson was liberally allowed to present his defense of duress to the jury and relate to them that he was at all times during the course of the robbery in fear of his life, and fearful of other threatened calamities. It is noted here that Wilson (in response to a telephone call) placed himself in the hands of the other two participants in the

armed robbery without making any attempt to invoke the aid and assistance of the authorities in any state from Pennsylvania to Mississippi. Also, he had ample opportunity to contact the Mississippi and/or Georgia authorities after the commission of the robbery but elected not to do so, although he did eventually surrender the money to the Army at Fort McPherson, Georgia. *Harley, supra,* did not say and does not mean that reversible error occurs every time testimony of this type is excluded. Exclusion here resulted in a large measure from sustaining objections to questions which were both leading and quite suggestive of answers. Again, as noted above, the defendant was allowed to freely testify time and again that threats against his children, his business, his life, and to expose his acts of infidelity were made prior to the robbery. Further, he testified that at all times during the actual commission of the robbery a shotgun was poked in his side, with Blake Brown's finger on the trigger. According to Wilson's testimony which the jury heard, it is obvious that at all times he claimed to be acting in response to mortal fear for his life, family, and property. Indeed, after the robbery when the three went back to the van and then went down the dead end street where he was left with the money and the gun, he was afraid he was going to "get his brains blown out."

Upon the testimony, exclusion of the actual statements made by Blake Brown was error but does not require reversal, because the record demonstrates beyond a reasonable doubt that the error had no effect upon the outcome of the trial. Heard by the jury was

abundant and repeated testimony on Wilson's theory that he was not a voluntary actor. With the great amount of testimony and evidence as to the defense of duress, which went to the jury, the actual statements claimed to be made by Blake Brown to Wilson before, during and after the robbery were cumulative of other testimony and not essential to the defendant's case.

Wilson also contends that the following exchange which took place at the trial was a fatal blow to his right to a fair trial and due process of law. The exchange referred to is as follows:

> BY MR. CONNER: Colonel, I'm going to ask you a question. Did you voluntarily participate in that robbery?
>
> BY MR. WEATHERS: Objection, Your Honor. That's improper. That's for this jury to determine.
>
> BY THE COURT: Sustained.
>
> BY MR. CONNER: Did you plan that robbery?
>
> BY MR. WILSON: No sir.
>
> BY MR. WEATHERS: Objection, Your Honor. Same reason.
>
> BY THE COURT: Sustained. Jury, you'll disregard the response to that question. The record will be stricken of that response.

Wilson contends this was fatal to his case because the trial judge by his actions told the jury to "disregard his response" meaning that the jury should disregard the defendant's denial of guilt. This is simply not the case because what the judge said could not logically have been accepted by jurors as instruction to disregard Wilson's acting under duress. Moreover, a later exchange on cross-examination was in mitigation of the matter. The later exchange was:

Q. [BY COUNTY ATTORNEY PHILLIPS]: Truth of the matter is, Colonel, that you pulled that robbery, knew you were caught, and you did everything in your power after you found out they had you to cover it up, just like you're covering it up today, didn't you Colonel?

A. No, sir.

BY HON. DUDLEY W. CONNER:
If Your Honor please, I can't hear the question.

BY HON. GEORGE L. PHILLIPS:
No further questions.

BY THE COURT:
You may repeat the question, counsel. He didn't hear it.

Q. I said the truth of the matter is that you pulled the robbery and you found out you were caught and then you started doing

everything in your power to cover your tracks from day one, just like you're sitting up here doing today, isn't it, Colonel?

A. No, sir, and I've told you that since I've been here.

This exchange on cross-examination emphasized to the jury that Wilson denied his guilt, and would again re-emphasize the fact that he claimed his actions resulted from duress. Therefore, this particular aspect of Wilson's argument does not merit reversal.

Next Wilson argues that the lower court erred in refusing to allow into evidence parts of a deposition of one of defendant's witnesses taken before trial. On October 26, 1978, the witness, Mrs. Lillie Curry, was deposed in Andalusia, Alabama, in the presence of Wilson's counsel and the Forrest County Prosecutor. In the deposition was a provision that "each party reserves the right to offer all or any part thereof of the deposition for evidence at the trial. . . ." On the third day of the trial the court was first made aware of the deposition at which time it was stated that Mrs. Curry had cancer and belonged to a "cult" which didn't believe in the taking of medication. Upon the record as made we find beyond a reasonable doubt no reversible error in the refusal of the court to admit the deposition into evidence, especially since the deposition contained inadmissible testimony.

Exactly why Mrs. Curry was not available to testify in person at the trial was not clearly revealed by the record. She was not subpoenaed to appear before the trial and no effort to procure her presence was made under our Uniform Witness Attendance Law: Mississippi Code Annotated §99-9-27, et seq. (1972). Early in our jurisprudence in *Dominges v. State*, 15 Miss. (7 Smedes & Marshall) 475 (1846), we spoke on the subject of depositions and said:

> The system of criminal jurisprudence appears to require the presence of the witnesses, both for and against the accused. Very often, in such prosecutions, much depends upon the appearance, manner and mode of testifying of a witness, and it is this that adds the superior character and importance to oral testimony.
>
> The practice in criminal cases of proposing to admit what was expected to be proved by absent witnesses, is not calculated to advance the ends of public justice; and if indeed regular and competent, should not be allowed or encouraged except in very extreme cases. (15 Miss. at 477, 478).

Contained in Mrs. Curry's deposition was testimony that she remembered Col. Wilson stopping at her gas station to purchase gas in Alabama on the date of the robbery. She stated that after Wilson left or as he

was leaving, a dark colored van containing two men pulled up to get gas but we note that she was unable to identify either of them. Upon the record as made, we find no reversible error in the lower court in the trial judge's refusing to accept her deposition into evidence especially where it is not likely that admitting the deposition into evidence would have resulted in a different verdict from that returned.

Next argued on behalf of Wilson is his contention that he was denied due process of law in that he was not represented by competent and effective counsel. The record shows Wilson was represented by a member of the State of Georgia Bar and by the Hon. Dudley W. Conner, an outstanding member of the Mississippi State Bar — these men were retained counsel, not court appointed. We stated in *Miller v. State*, 231 So.2d 178 (Miss. 1970) that "An accused who retains his own attorney waives his right to complain of his counsel's competency. *King v. State*, 374 So.2d 808 (Miss. 1979) held that a defendant in a criminal case on appeal "may not here complain that he was not properly represented" where it appears at the trial level he had counsel of his own choice. Looking at the record on the case as a whole, our opinion is that Wilson was fairly and vigorously defended. The record does not show that the conduct of Wilson's trial counsel was so lacking in diligence and competence as to reduce the trial to a farce or a mockery, nor could it shock the conscience of the court.

Another assertion made on the appeal of Wilson is that the lower court erred in imposing a 20-year sentence because the sentence was excessive and not reasonably calculated to be less than life. Under the applicable statute, conviction could have carried with it a sentence of life imprisonment, if imposed by the jury. Wilson argues that he is approximately 50 years old with a 22-year life expectancy and therefore his sentence is not reasonably expected to be less than a life sentence. We held in *Stewart v. State*, 372 So.2d 257 (Miss. 1979) that:

> Upon remand, the trial court will make a record of and consider all relevant facts necessary to fix a sentence for a definite term reasonably expected to be less than life. The court should consider the age and life expectancy of the defendant and any other pertinent facts which would aid in fixing a proper sentence. (372 So.2d at 259).

In the case now on appeal here, it is obvious to us that under *Stewart, supra,* the trial judge considered "other pertinent facts which would aid in fixing a proper sentence." In handing down the sentence, the sentencing judge noted that Wilson's attitude was not that of one who felt "sorry for the things he's been involved in." It is also obvious that the sentencing judge considered the fact that Wilson's alleged principals: Blake Brown or the man known as John, had not been brought to justice. Wilson appears to be the only person introduced in

the trial who could have supplied information about the other two. We are unable to say that the sentence at issue is unduly excessive or that it violates our established standards.

Last argument made is that the court erred in refusing to grant one of the jury instructions (D-3 requested by Wilson). The reason stated below by the trial court in refusing to grant D-3 was that it had already granted D-5, which the court felt was inclusive of the substance of D-3. Careful reading and scrutiny of the two instructions reveal that they are based on "substantially the same theory" and therefore the trial judge did not abuse his sound discretion in rejecting D-3.

Looking at the record as a whole, along with very excellent briefs and oral arguments, we perceive this case as one where the accused did not get a perfect trial, but did get a fair trial which lacked any grievous or prejudicial error. His defense of duress was founded upon activities of the other two mysterious principals in the crime and a female named "Linda", none of whom appeared at the trial and testified. The jury, as it had a right to do, rejected Wilson's theory of the case and we cannot say that reversible error is demonstrated in the record.

AFFIRMED.

PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J., SUGG, WALKER, LEE, BOWLING and COFER, JJ., CONCUR.

APPENDIX D

IN THE SUPREME COURT OF MISSISSIPPI

NO. 51,869

EMORY M. WILSON

versus

STATE OF MISSISSIPPI

WALKER, JUSTICE, DISSENTING:

Dec. 3, 1980

ON PETITION FOR REHEARING

I must respectfully dissent from the holding of the majority which affirms a twenty-year sentence, without benefit of probation or parole,[1] imposed by the Circuit Court of Forrest County upon Emory M. Wilson.

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1 Mississippi Code Annotated section 47-7-3(d) (Supp. 1980) mandates that he serve a minimum of ten years before he will be eligible for parole. The trial court was without authority to remove from Wilson all rights of parole or probation.

Such a severe sentence is ordinarily imposed upon criminals who have caused bodily harm, injury or death to someone during the perpetration of a crime. The real magnitude of the sentence can only be fully appreciated when it is understood that this defendant was not allowed to fully, completely and adequately present his defense to a jury, a right guaranteed to every defendant by the Constitutions of the United States and the State of Mississippi. The Constitutions guarantee to every accused the right to a fair trial before his freedom may be taken from him. No man is entitled to a perfect trial, but if the lack of perfection rises to the point of causing the trial to be unfair, then the cause should be reversed and the accused given an opportunity to present his case to another jury. It is in this regard that reversible error, in my opinion, was committed in this case. By no valid rationalization or legalistic reasoning can I bring myself to the conclusion that the errors admittedly committed[2] were harmless beyond a reasonable doubt as that term has heretofore been defined by the United States Supreme Court.

The law is well settled, and in fact it is conceded by the Attorney General, that if a person commits a crime at the direction of another and as a result of threats to

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2 The majority opinion and the Attorney General concede that the trial court committed error in not admitting the defendant's testimony as to the actual threats on him.

his life and/or serious physical abuse to his person, such individual is not to be held accountable for his involuntary act.[3] This was the defense asserted by the defendant, who claims that he participated in the armed robbery only because of and as a direct result of threats upon his life and the well being of his children and his business.

He freely admitted his role in the crime, but sought to prove he had no choice. Because of erroneous evidentiary rulings below his efforts to fully present the facts on which he based his sole defense were continually frustrated. A defendant has a legal right to have the jury consider his sole defense and an error which denies him that right is substantial, not harmless.

Evidence of the communication of threats to Wilson was admissible, not for the purpose of proving the validity of such threats, but for the purpose of showing the state of mind of the defendant and why he acted in a particular way. Statements offered for any reason other than to prove the truth of the facts asserted are simply not hearsay.[4] This Court has held that the

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3 This defense is discussed in one of the more notorious cases of our time, *United States v. Hearst*, 563 F.2d 1331 (9th Cir., 1977).

4 Anderson v. United States, 417 U.S. 211, 219 (1974); Giblin v. United States, 523 F.2d 42, 45 (8th Cir., 1975); United States v. Carter, 491 F.2d 625, 628 (5th Cir., 1974).

exact words of a threat are of such importance and so crucial to a defendant's claim of self-defense that to refuse to permit their introduction into evidence constitutes reversible error.[5] It follows that statements the defendant sought to introduce in this case were admissible to show the effect they had on him. It is true that the jury was aware that the defendant had a shotgun pointed at him during the commission of the crime. However, the jury may not have appreciated the full meaning and import of Wilson's having a shotgun pointed at him without hearing what the shotgun holder said he would do if his orders were disobeyed. In this case each time the defendant attempted to inform the jury what his captors threatened would happen to him if he did not obey the commands, the State interposed an objection, which was sustained by the trial court, and the defendant was admonished that such testimony was inadmissible in evidence. Even the defendant's own counsel, who was attempting to abide by the rulings of the court, although erroneous, told the defendant not to repeat what was said to him. Fortunately, however, in the defendant's frustration to tell the complete story, he blurted out one of the many threats[6]

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5 Leverett v. State, 112 Miss. 394, 73 So. 273 (1916); Clark v. State, 123 Miss. 147, 5 So. 188 (1920).

6 The defendant points out *20* examples in the transcript of objections to his testimony which were sustained. At least seven of the objections concerned what was said to Wilson by his captors before, during and after the robbery. The example in the text is the only time Wilson was able to answer before an objection was made and sustained.

he received from his captors minutes before the armed robbery took place, or this record would be devoid of the vicious character of his captors and the mentally debilitating situation the defendant was in. Colonel Wilson stated, "He was threatening my life, and he told me that he was going to blow my head off if I didn't cooperate." When the defendant blurted this threat out there was an immediate objection by the prosecuting attorney which was sustained by the trial court who promptly admonished the jury to disregard the response. The trial court's admonition to the jury, in my opinion, effectively told them that the threats made upon this defendant's life were irrelevant to the trial of the case and should be disregarded by them.

I am of the opinion that the error was so grave, the issue so crucial and the consequences so drastic that this Court cannot, in good conscience, say that this error did not in any way or in any manner influence the jury in its final determination, beyond a reasonable doubt.

The majority opinion refers to the "alleged participants" as if there were no corroboration of their existence, when, in fact, the very police woman who followed the defendant's automobile after it left the site of the armed robbery and who noted the tag number of the vehicle testified that there were *three* people in the vehicle. This testimony was not contradicted and is not unreasonable or in any way inconsistent with the defendant's testimony, or that of the victims.

The undisputed facts, leaving aside the disputed issues, belie any suggestion that Wilson's conduct was the voluntary act of a rational man — yet there is not a scintilla of evidence that the defendant was not completely rational and intelligent. I suggest that a rational man would not concoct such a scheme voluntarily, with its inception beginning in Pennsylvania, a drive of approximately seventeen hours from Hattiesburg, and ending several hours later in Atlanta. An intelligent man, such as the defendant, would know that his absence over such an extended period of time from his office and home would be enough in itself to arouse someone's suspicion or interest as to his whereabouts. This fact renders suspect the contention that he voluntarily entered into this situation.

The defendant is an ex-veteran with twenty-nine years of service in the Army Reserves, presently holding the position of Colonel and Commandant of his unit. Certainly, he knew that to voluntarily commit such an offense against the Army Reserve unit in Hattiesburg would subject him to a dishonorable discharge and the loss of any benefits which have accrued during his service in the Reserves. Moreover, he is a family man with a wife and three children, is a deacon in his church and is actively engaged in civic affairs in his community. At the time this offense was committed he had three going furniture stores and there was no proof or indication that any of them were in serious financial trouble.

I make no judgment on Wilson's guilt or innocence, but the facts of this case disturb me deeply. I am convinced that, since this defendant was not allowed to fully and completely present the defense to which the law entitles him, he did not receive a fair trial and the petition for rehearing should be sustained and this cause remanded for a new trial.

PATTERSON, C.J., SMITH, P.J., AND BOWLING, J., JOIN IN THIS DISSENT.